United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2453

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

Docket #74-2453

JAMES CARFORA,

Defendant-Appellant.

BRIEF OF APPELLANT CARFORA

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BRIEF OF APPELLANT CARFORA

Appellant James Carfora was convicted after a jury trial before District Judge Edward Weinfeld of violating the obstruction of justice statute. 74 CR 755-SDNY. He received a one year sentence, and was not admitted to bail pending appeal.

A timely Notice of Appeal has been filed.

Carfora is appealing in forma pauperis, and the author of this brief has been assigned as counsel to him.

THE INDICTMENT

In one count the indictment recites:

"On or about the 20th day of July, 1974, in the Southern District of New York, the defendant,

James Carfora, corruptly and by threat of force, and by a threatening communication, endeavored to influence, obstruct and impede the due administration of justice, by stating over the telephone to Shirah Neiman, an Assistant United States Attorney for the Southern District of New York, that she would be dead if anything happened to him on August 1, 1974, the date upon which he had been ordered to surrender for service of a sentence duly imposed by a Judge of the United States District Court.

(Title 18, United States Code, Section 1503.)"

THE STATUTE INVOLVED

The obstruction of justice statute (18 USC 1503), more specifically labelled "influencing or injuring officer, juror or witnesses generally," recites:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or

having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

THE GOVERNMENT'S CASE

Shirah Neiman, an Assistant United States Attorney, testified that on Saturday evening, July 20, 1974, at 7:45 in the early evening, James Carfora telephoned her at her home 165 West End Avenue, Manhattan, telephone #877-8781. She claims to have recognized his voice, and that Carfora said to her "if anything happens to Carfora on the first, you're dead." Ms. Neiman immediately wrote this on a memo paid (Exhibit 3), and promptly phoned her office superior. R. 16, 28-32.

Shirah Neiman was home alone at the time. R. 38. As such the government had no other witnesses to offer in support of the charge.

Actually Ms. Neiman had been the government attorney in a 1972 prosecution of Carfora for mail fraud, for which he received a suspended sentence. R. 19. Furthermore, Ms. Neiman had represented

the government in pressing probation revocation proceedings against him in 1972 and 1973, which proceedings resulted in his revocation of probation, and the imposition of a four month sentence on May 4, 1973. R. 20, 48. Subsequently Carfora appealed the revocation decision to this court, which affirmed it by a split decision. 489 F2d 354. In May 1974 the Supreme Court denied certiorari. 42 USLW 3652, 3647.

On July 12, 1974, District Judge Murray Gurfein, who had presided at both the trial and the revocation proceedings, denied Carfora's motions to reduce the sentence or vacate the decision to revoke probation. R. 75. Judge Gurfein directed that Carfora surrender on August 1st to commence serving the four month sentence. R. 21-22, 75, 76, 79-80.

As such the theory of the government's case was that on July 20th Carfora telephoned Shirah Neiman with respect to the date of surrender that Judge Gurfein had directed eight days earlier.

THE DEFENSE

The defense offered four witnesses, including Carfora himself, that on the date and time in question, July 20th, at 7:45 P. M., Carfora was having dinner with Peter Choras, Tibor Hobler and Joseph Hobler, at Carfora's apartment at 204 W. 14th Street, Manhattan. Choras and

the Hobler brothers testified that on that evening from 7:00 o'clock to a little past 8:00 o'clock, Carfora was with them at all times while they all had dinner together. Each of the three testified that at no time did Carfora make a phone call, or walk away from their side. Each of the three testified they remembered well the evening, for later that night federal agents visited all three when they came to arrest Carfora. Furthermore, each of the three remembered that the parents of the Hobler boys were returning from their European trip the next day. R. 125-136, 177-188,219-227.

Carfora testified, and denied the phone call in question, but corroborated the testimony of his witnesses with respect to their having had dinner with him at his apartment that evening. R. 249-258.

Over defense objections, the government was allowed to impeach Carfora by inquiring as to a 1965 state conviction for attempted grand larceny. R. 258.

In cross-examination of Shirah Neiman, and in summation to the jury, the defense did not question the ability of Ms. Neiman to recognize Carfora's voice for she had heard it in court on countless times. The defense did question her credibility, and introduced evidence, and argued to the jury, that Ms. Neiman had a bias against Carfora from her long

association with the cases against him, and that she had a motive to testify falsely because of her disappointment that Carfora received a sentence of only four months. R. 58-60.

It cannot be said that the defense evidence and argument did not make some impression upon the jury, for they deliberated twelve hours before they reached a verdict. R. 488-489. Furthermore, at one point the jury reported that it was hopelessly deadlocked, and the trial court gave an Allen charge. R. 484-485, 486-487.

PRE-TRIAL APPLICATION

Prior to trial the defense had applied to the District Court for dismissal of the indictment on the grounds there just was no longer a proceeding pending before the District Court on July 20, 1974, at the time of the phone call. Furthermore, the defense argued that the obstruction of justice statute by its very terms was designed to protect jurors, witnesses, judges, and was not designed to protect counsel for a party. The District Court denied the application, without writing an opinion.

POINT ONE

THE EVIDENCE FAILS TO ESTABLISH A FEDERAL OFFENSE, WITHIN THE STATUTORY LANGUAGE OF 18 USC 1503. THE CASE HAD BEEN COMPLETED, AND WAS NO LONGER PENDING. FURTHERMORE, THE STATUTE LIMITS ITS PROTECTION TO JUDGES, JURORS AND WITNESSES.

By July 20, 1974 the case of United States v. James Carfora - Docket #71 CR 31, SDNY, had been completed. There was nothing further to be done, other than for Carfora to surrender on August 1st, as Judge Gurfein had directed on July 12th. As such we submit that there was not a "matter pending", as required to activate the obstruction statute.

In the original proceeding Carfora had been indicted on January 12, 1971 on nine counts of mail fraud. 18 USC 1341. The trial took place in January 1972, and a jury convicted him. On March 6, 1972 Judge Gurfein suspended the imposition of sentence, and placed Carfora on probation for a period of two years. Furthermore, he imposed a fine of $2500.00 and imposed a special condition of probation that full restitution be made.

On June 26, 1972, as a result of a hearing brought on by a charge of violation of probation, Judge Gurfein dismissed the charge, and modified his special condition of probation to provide for installment payments of the restitution.

On August 16, 1972, the probation department filed another petition charging Carfora had violated his probation by not making the required installment payments. Hearings were had during the period from September 1972 until January 1973. By opinion and decision, dated May 4, 1973, Judge Gurfein revoked probation, and imposed a split sentence, pursuant

to 18 USC 3651 - four months imprisonment to be followed by two years probation. Carfora was admitted to bail pending appeal from that decision.

In November 1973, by a two to one decision, with Judge Feinberg dissenting, this Court affirmed the decision of Judge Gurfein. 489 F2d 354. The Court stayed its mandate and continued the bail of Carfora pending his application for a writ of certiorari.

On May 28, 1974, the Supreme Court of the United States denied Carfora's application for a writ of certiorari. 42 USLW 3652, 3647.

On July 12, 1974, Judge Gurfein denied Carfora's written application, made by notice of motion, with supporting affidavit and memorandum of law, to reconsider his decision to revoke probation, and denied Carfora's application to modify or reduce the sentence in any way. R. 75. Judge Gurfein denied Carfora's application to postpone his surrender until later in August, and specifically directed that Carfora surrender on August 1st to commence service of his sentence. R. 75. Ms. Neiman conceded that Judge Gurfein was "very firm" in directing surrender by August 1st. R. 79-80. Ms. Neiman testified that in substance Judge Gur fein said with regard to the date of surrender, "August 1st, that's it, I don't want to hear any more". R. 76. Further-

more, Judge Gurfein told counsel on July 12th he was going away for more than a month, and that he would not be available prior to that time.

Over defense objection, Ms. Neiman was allowed to testify that at the July 12th oral argument, Judge Gurfein stated that Carfora had not learned his lesson, and could not be trusted. He just did not want to make restitution. Ms. Neiman was allowed to testify that Judge Gurfein called Carfora "a slippery fish". R. 105. The trial court denied the defense application to strike that portion of the testimony. R. 106. As a matter of fact Carfora surrendered on August 1st, without applying for an extension of time with regard to that date. R. 85.

The government's case was based on the theory that between July 12th and August 1st, Carfora could have made ar additional application with respect to the surrender date, and could have made an additional application with respect to a reduction in sentence. It is obvious that in the context of this case, that argument was so totally theoretical as to be devoid of any reality. As of July 12th there were just no further proceedings pending with respect to that particular case. Motions had been made and decided. There just was nothing left for Carfora or his counsel to do. Finality had come to the case. We submit that the act of surrender on August 1st, is a purely ministerial act, that does not occur in the courtroom, and cannot be considered an aspect of a court proceeding. We

submit that there just was no longer any proceedings pending on July 20, 1974 - the date of the offense. The government cannot point to a single case in which section 1503 has been applied to proceedings which have been completed, as was this one. All reported opinions deal with matters in which a grand jury proceeding or trial is actually taking place. There is just no reported opinion which has extended the operation of this statute to a time when all judicial proceedings have been completed and there is just nothing further to do other than for the defendant to surrender.

In addition, there is just not one reported decision or opinion to show that government counsel comes within the protection of section 1503. A reading of that statute will show that by its very language it was intended to protect only jurors, witnesses, magistrates and judges. It was not designed to protect parties, nor was it designed to protect counsel for any of the parties. Shirah Neiman was just another lawyer in that case, as was defense counsel. Certainly we cannot believe that defense counsel was protected by the statute.

Nor are we dealing with an event which took place in the federal courthouse or any other federal territory. The phone call was made to Shirah Neiman's home on a Saturday evening.

Three reported cases of the Ninth Circuit set forth the proper scope of the operation of the obstruction of justice statute. While it is

somewhat broad in its scope, it does have its limitations. The Ninth Circuit recognized that the statute is designed to protect only certain specified persons at certain specified times.

In Haili v. United States 260 F2d 744, 746, (CA-9, 1958), quoted with approval in United States v. Metcalf, 435 F2d 754, 756 (CA-9, 1970), and cited with approval in United States v. Ryan, 455 F2d 728, 733 (CA-9, 1971), the Court of Appeals for the Ninth Circuit stated:

> "Interfering with witnesses, jurors and parties operates to bring about a miscarriage of justice in specific cases. Under the rule of ejusdem genris, the general words which follow the specific words in the enumeration of prohibited acts in the section here involved must be construed to embrace only acts similar in nature to those acts enumerated by the preceding specific words."
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> "Thus, not ony must the broad term" due administration of justice" be limited to pending judicial proceedings, but also the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions." (emphasis added).

POINT TWO

THE COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO IMPEACH THE DEFENDANT AS A WITNESS BY INQUIRING AS TO A NINE YEAR OLD PRIOR CONVICTION

Prior to Carfora testifying on his own behalf, his counsel asked the District Court to prohibit the government from utilizing any prior convictions for impeachment purposes. Government counsel stated it

wished to use only one prior conviction - attempted grand larceny in the State of New York in 1965. Defense counsel requested the trial judge not to permit the government to utilize that conviction. However, the District Court overruled the defense request, and allowed the government to impeach the credibility of Carfora by inquiring as to that nine year old conviction. R. 246-247, 258.

This court's opinion in Palumbo, 401 F2d 270, 273 (1968) has taught us what we have known all along - in many instances "A prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice." 401 F2d at 273. Palumbo did note that a trial judge should take into account the age of the conviction. At 273.

In United States v. Puco, 453 F2d 539, 543-544 (1971), this Court held that the District Judge erroneously exercised his discretion in permitting the prosecution to impeach the credibility of the defendant by the use of a twenty-one year old conviction. In a discussion on the effect of a conviction of some years past, this Court did note that the legitimate effect upon the present credibility of a defendant is weakened by the use of a remote conviction. The Court noted the ten year limitation embodied in Rule 609 (b) of the rules of evidence for United States courts. This Court has wisely stated, "Old convictions are not a meaningful index

of propensity to lie,"..."has little bearing on testimonial trustworthiness," 453 F2d at 543.

In our case James Carfora had the unique problem of matching his credibility against that of Assistant United States Attorney Shirah Neiman. As such he started off with obvious disadvantages. As Ms. Neiman was the only witness for the government's case in chief, it was solely her credibility as against his and other defense witnesses. The government was given an undue advantage when it was allowed to so impeach his credibility for now the contest became one between a government prosecutor and a convicted defendant. As the conviction was almost ten years old, we submit that the District Court abused its discretion in allowing the government to so impeach Carfora. Obviously this was a closely contested trial. The fact that the jury took twelve hours to reach a verdict, and at one point reported itself deadlocked, evidenced that the jury was not overwhelmed with the government's case. As such,small items, such as a prior conviction, can often tip the scale.

POINT THREE

THE TRIAL COURT ERRED WHEN IT GAVE A ONE SIDED ALLEN CHARGE, AND REFUSED TO GIVE THE CORRECTIVE REQUEST OF THE DEFENSE

At 10:45 A. M., the jury commenced its deliberations after hearing the Court's instructions. R. 478.

At 5:15P. M. the jury sent a note (Court Exhibit 3) to the trial judge stating "We have reached an impasse". R. 484-485. At that point the trial court recalled the jury, and gave them a modified Allen charge, in which he stated in part that the minority should listen carefully to the arguments of the majority."...That if the much larger number were for conviction a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men...that if the much larger number were for a conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many equally honest, equally intelligent minds. If upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." (R. 486).

The defense excepted to the charge as given, and requested the District Court to instruct the jury that in addition the majority should listen to the minority in its deliberations (R. 487):

"MR. WALES: While Your Honor has instructed the jury that the minority should listen to the majority, I am going to ask Your Honor to also instruct the jury that the majority should listen to the minority in its deliberations.

THE COURT: I am not going to alter the instruction.

MR. WALES: I except as Your Honor gave it."

The jury resumed its deliberations at 5:35 P. M. It finally reached its verdict at 10:55 P. M. R. 488. As such, even allowing for a dinner break, the jury deliberated approximately four hours pursuant to instructions that the minority must listen to the majority, but the majority need not listen to the minority.

This supplemental instruction is really at odds with the fundamental premise that all jurors are equal as to their expressions of their views, and that each juror should listen carefully to the opinions of every other juror. R. 475.

We are familiar with the decision of this Court in United States v. Martinez, 446 F2d 118, 119-120 (1971), which discusses in detail the various court opinions with respect to the Allen charge. We do not quarrel with that opinion or the decision of this Court or other courts as it has applied to the Allen charge. Actually this Court has yet to review a trial court's charge which advises only the minority to reconsider the reasonableness of their views. As the trial court rejected the defense request that he charge that the majority also reconsider the correctness of their initial position, this Court is now squarely confronted with a yet unresolved issue as to whether a trial judge can properly ask only some jurors, but not all jurors, to reassess their views.

In United States v. Seasholtz, 435 F2d 4, 7, footnote 4 (CA-10, 1970), the Tenth Circuit reviewed a trial court instruction which advised the minority to listen carefully to the majority.

In United States v. Martinez, 446 F2d 118, 119 (CA-2, 1971), this Court cited the decision of the Tenth Circuit in Seasholtz, and noted that the Allen charge presents no problem when the trial judge is unaware of the existence of a minority faction in the jury room, "and is addressing his remarks particularly to them". (emphasis added).

In our case the District Court was addressing his remarks particularly to the minority, and specifically rejected the defense request that he also address his remarks to the majority. In substance the defense wanted the trial court to properly instruct the entire jury - both majority and minority. However, the trial court had insisted in instructing only the minority. In that regard the trial court erred. In considering the significance of this error, we should note that this was a single count indictment involving only one defendant. The issue appeared very simple - it pertained solely to the placing of one telephone call. Yet obviously the jury was deeply troubled by this issue for it took twelve hours to reach a verdict, which verdict resulted only after the trial judge gave a modified Allen charge directed solely to the minority.

CONCLUSION

The conviction should be set aside and dismissed because of federal jurisdictional principles. Alternatively, a new trial should be had.

Respectfully submitted,

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